No. 83-1249

(5)

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN CARY SIMS AND
SIDNEY M. WOLFE, PETITIONERS

v.

CENTRAL INTELLIGENCE AGENCY
AND WILLIAM J. CASEY,
DIRECTOR OF CENTRAL INTELLIGENCE

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

ROBERT E. KOPP
LEONARD SCHAITMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

STANLEY SPORKIN
General Counsel

EDWARD PAGE MOFFETT
Assistant General Counsel
Central Intelligence Agency
Washington, D.C. 20505

17 pp

QUESTION PRESENTED

Whether the Freedom of Information Act requires the Director of Central Intelligence to disclose the institutional affiliations of scientific researchers whose identities are exempt from disclosure because they are intelligence sources, when the Director has reasonably determined that disclosure of the institutional affiliations would create an unacceptable risk of revealing the researchers' identities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 709 F.2d 95. The opinions and order of the district court (Pet. App. 21a-34a) are unreported. An earlier opinion of the court of appeals (Pet. App. 35a-64a) is reported at 642 F.2d 562. One of the earlier opinions of the district court

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[1] "Pet. App." refers to the appendix to the petition in No. 83-1075.

(Pet. App. 73a-93a) is reported at 479 F. Supp. 84; the other earlier opinions and orders of the district court (Pet. App. 66a-72a, 94a-97a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1983 (Pet. App. 19a-20a). A petition for rehearing was denied on August 17, 1983 (Pet. App. 17a). On November 9, 1983, the Chief Justice extended the time in which to file a petition for a writ of certiorari in No. 83-1075, which seeks review of the same judgment of the court of appeals, to December 15, 1983. On December 5, 1983, the Chief Justice further extended the time in which to file a petition for a writ of certiorari to December 29, 1983. The petition in No. 83-1075 was filed on that date and was granted on March 5, 1984. The cross-petition, No. 83-1249, was filed on January 27, 1984, and was granted on June 11, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The facts and background of this case are recounted in our brief in No. 83-1075 (83-1075 Gov't Br. 2-11). Cross-petitioners filed suit under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking, among other things, the names of private researchers who performed research for the Central Intelligence Agency in connection with a CIA project known as MKULTRA. Research for this project was performed by many individuals affiliated with institutions such as universities; cross-petitioners sought the names of both the individuals and the institutions.

In response, the CIA invoked Exemption 3 of the FOIA, which provides that an agency need not disclose "matters that are * * * specifically exempted from disclosure by statute * * * provided that such statute * * * refers to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)). The statute on which the CIA relied is Section 102(d)(3) of the National Security Act of 1947, which provides in part that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)). The Agency's position is that the researchers are "intelligence sources" and therefore exempt from disclosure under Exemption 3 and 50 U.S.C. 403(d)(3).

The United States District Court for the District of Columbia initially rejected the Agency's Exemption 3 claim (Pet. App. 77a-79a). The court of appeals subsequently vacated the district court's ruling, propounded a definition of "intelligence sources," and remanded for reconsideration in light of that definition (*id.* at 35a-64a). The court of appeals' definition was as follows (*id.* at 50a):

> [A]n "intelligence source" is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

On remand, the district court ordered the disclosure of the names of about half of the individual researchers and the institutions with which they were affiliated (Pet. App. 21a-34a). The district court held that the identities of the other researchers were exempt from disclosure either because they had sought and received express promises of confidential-

ity from the Agency (*id.* at 26a) or because they had engaged in other intelligence activities, apart from MKULTRA, for the CIA (*id.* at 31a). The district court also ruled that the Agency need not disclose the institutional affiliations of the individual researchers whose identities were exempt from disclosure (*id.* at 27a, 34a).

Both sides appealed, and the court of appeals reversed in part and affirmed in part (Pet. App. 1a-11a). The court of appeals stated that "[a]lmost all of the District Court's various rulings were judicious and proper" (*id.* at 3a). But the court of appeals faulted the district court for focusing on whether researchers had received promises of confidentiality; the court of appeals stated that "[p]roof that the CIA did or did not make promises of secrecy (either express or tacit) to specific informants * * * [cannot] be dispositive of the question whether a given informant qualifies as an 'intelligence source'" (*id.* at 6a). The court of appeals entered an order reversing "the District Court's determination regarding which of the individual researchers satisfy the 'need-for-confidentiality' portion of the [court of appeals' definition] of 'intelligence source'" but affirming "[a]ll other aspects of the [district] court's decision" (*id.* at 11a).

The question in No. 83-1075 is whether the court of appeals' definition of "intelligence sources" is correct. The question in this case is whether the court of appeals erred in affirming the district court's ruling that the Agency is not required to disclose the institutional affiliations of the individual researchers whose identities are exempt from disclosure.

SUMMARY OF ARGUMENT

In carrying out his responsibility under 50 U.S.C. 403(d)(3) to "protect[] intelligence sources and methods from unauthorized disclosure," the Director of Central Intelligence must do more than simply withhold the names of intelligence sources; he must also prevent the disclosure of apparently innocuous information if it would enable an observer—such as a hostile foreign intelligence service—to infer the identity of a source. Here, the Director determined that disclosing the institutional affiliations of the MKULTRA researchers would create an unacceptable risk that individual researchers' identities would be discovered. The district court and the court of appeals upheld the Director's decision, and their concurrent determination is supported by the record. Indeed, common sense alone dictates that it was reasonable for the Director to conclude that disclosure of the researchers' institutional affiliations might lead to disclosure of their identities; even cross-petitioners do not deny this. There is, accordingly, no reason for this Court to reconsider this fact-bound issue.

Cross-petitioners suggest that the Director's decision to release the names of the institutions that consented to disclosure somehow estops him from withholding the names of the other institutions. Such an approach is inconsistent with the purposes of both the Freedom of Information Act and the protections afforded to the CIA; it would have the perverse effect of discouraging the Director from making disclosures of information even when he determines that a disclosure is in the national interest.

ARGUMENT

THE DIRECTOR OF CENTRAL INTELLIGENCE IS NOT REQUIRED TO DISCLOSE THE INSTITUTIONAL AFFILIATIONS OF MKULTRA RESEARCHERS WHO ARE INTELLIGENCE SOURCES

1. The Director of Central Intelligence is responsible for "protecting intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)). In exercising this authority granted by Congress, the Director must, of course, do more than simply withhold the names of intelligence sources, precise descriptions of intelligence methods, and similar information that would enable even a casual observer immediately to identify an intelligence source or method. Many of those observers from whom it is most important to "protect" intelligence sources and methods —such as hostile foreign intelligence services—must be presumed to have both the capacity to gather and analyze any information that is in the public domain and substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details. See, *e.g.*, *Halkin* v. *Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978), quoting *United States* v. *Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) (" 'What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.' "); *Gardels* v. *CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982), quoting *Halperin* v. *CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980) (" '[E]ach individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself'.").

Consequently, as cross-petitioners acknowledge (Br. 36), the Director, in exercising his authority under Section 403(d)(3) to protect intelligence sources, must sometimes withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source. See *Gardels*, 689 F.2d at 1103-1104; *Halperin*, 629 F.2d at 147. And as cross-petitioners further recognize (Br. 38), the Director's decision that certain information must be withheld in order to protect an intelligence source should be given the greatest deference, in view of the Director's unique expertise and the magnitude of the government interests at stake. See *Halperin*, 629 F.2d at 148.

2. a. The basis of the district court's decision to permit the withholding of the institutional affiliations of the researchers whose identities were exempt from disclosure was that "disclos[ure of] the identities of the institutions * * * might lead to the indirect disclosure of" individual researchers (Pet. App. 27a).[2] This determination was supported by an affidavit, filed by a CIA operations officer familiar with MKULTRA, which stated that disclosure of the institutions at which MKULTRA research was performed would "threaten[en the] * * * exposure of past relationships with the institution[]" (J.A. 27).[3] Moreover, this

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[2] Cross-petitioners agree that this was the basis of the district court's ruling on this point. See Br. 36. We note that we continue to believe that the institutions at which MKULTRA research was conducted are exempt from disclosure for the additional reason that they are themselves "intelligence sources." See Pet. App. 91a-92a.

[3] Oddly, cross-petitioners quote this affidavit (Br. 37) as evidence that the Agency did not make a judgment that disclosure of the institutions would also reveal the individual researchers. Cross-petitioners emphasize the fact that the

determination is plausible on its face and should have been upheld even if it lacked specific documentary support in the record: common sense dictates that it was reasonable for the Director to conclude that an observer who is knowledgeable about a particular intelligence project, like MKULTRA, could, upon learning that research was performed at a certain institution, often deduce the identities of the individual researchers. Since the Director's determination was reasonable and was upheld by both the district court and the court of appeals, there is no reason for this Court to reconsider it.

b. Cross-petitioners never deny that the Director could reasonably conclude—especially in light of the very great degree of deference that should be accorded to his determinations—that withholding institutional affiliations was necessary to protect the identity of individual researchers from unauthorized disclosure. Indeed, cross-petitioners have offered no explanation for their own effort to learn the institutional affiliations except that they want "to identify the [individual] researchers, talk to them, and * * * undertake further independent analysis to determine what they did" (Br. 5).

Cross-petitioners' principal argument in favor of overturning the concurrent determination of the courts below is, instead, that the CIA did not introduce sufficient affidavits supporting its decision to

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affidavit speaks of relationships "with the institution[]" and seem to be suggesting that the Agency was not concerned about the exposure of relationships with individuals at the institution. But a relationship with an institution is necessarily a relationship with individuals at the institution; to be concerned about the exposure of a relationship with an institution is necessarily to be concerned about the exposure of a relationship with individuals affiliated with the institution.

withhold the institutional affiliations. See Br. 36-38. But the sufficiency of the Agency's affidavits is primarily a matter for the trial court to determine, subject to the review of the court of appeals. That is particularly true in a case like this, where the focus of the litigation frequently shifted and the governing law was altered by the court of appeals during the course of the protracted litigation. In any event, as we noted, the Agency's position was in fact supported by an affidavit and could have been upheld even if it was not, since it was manifestly reasonable and in accord with common sense.

c. Cross-petitioners also appear to suggest that because the Agency has already revealed the names of many of the institutions at which MKULTRA research was performed, it is somehow estopped from withholding the names of the others. See Br. 37-38. This suggestion is affirmatively mischievous and potentially damaging to both the CIA's mission and the objectives of the Freedom of Information Act.

During congressional and other inquiries into MKULTRA, then Director of Central Intelligence Turner notified the 80 institutions at which MKULTRA research had been conducted (see Pet. App. 39a). Many of these institutions had not previously been officially advised of their involvement, and as Director Turner explained in an affidavit, he notified them as part of "a course of action [designed to] lead to the identification of any unwitting experimental subjects" (*id.* at 92a n.1). In addition, the notification enabled the institutions to determine the scope of their involvement and to protect their reputations against unwarranted accusations based on rumor and speculation about MKULTRA research. See *Project MKULTRA, the CIA's Program of Re-*

search in Behavioral Modification: Joint Hearing Before the Select Comm. on Intelligence and the Subcom. on Health and Scientific Research of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 36-38 (1977). Many of these institutions disclosed their involvement to the public, and others advised the CIA that they had no objection to public disclosure. In the interests of furthering public understanding of MKULTRA, Director Turner then disclosed the names of these institutions to the public. He did not disclose the names of any institutions that objected to disclosure. See Pet. App. 39a, 73a-74a.

Congress did not mandate the withholding of information that may reveal the identity of an intelligence source; it made the Director responsible only for protecting against *unauthorized* disclosures. The national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources. Director Turner, in making a related point, mentioned a well-known example in his affidavit (Pet. App. 90a):

> [D]uring the Cuban missile crisis, President Kennedy decided to release a great deal of sensitive intelligence information concerning Soviet missile installations in Cuba. It was clear, at that time, that the Soviets had to be told publicly that the United States government had precise information on the extent of the Soviet threat in order to justify the strong countermeasures then taken by our Government.

Director Turner similarly decided that the benefits of disclosing the identities of institutions that had no objection to disclosure outweighed the costs of doing so. But the fact that he made that determination in 1978 (*id.* at 39a) does not bind his successors to make

the same determination, in a different context, with respect to institutions that have requested the Director *not* to disclose their identities. See, *e.g.*, *Salisbury* v. *United States*, 690 F.2d 966, 971 (D.C. Cir. 1982); *Halkin*, 598 F.2d at 9.

When the Director of Central Intelligence (or the President) decides whether a disclosure of sensitive information bearing on the intelligence-gathering process will serve the national interest, he must weigh a variety of complex factors, many of which will require the assessment of other secret information or the use of his informed judgment about foreign affairs or, for example, the role of an intelligence agency in a democratic society. It would be inappropriate for a court to attempt to decide whether a decision to disclose information, based on such factors, is somehow inconsistent with a subsequent decision to withhold information that appears to be similar. Moreover, under cross-petitioners' approach, the Director would always have to consider the possibility that the disclosure of certain information will prejudice efforts to withhold superficially similar information in the future. The inevitable result would be less disclosure even in instances where the Director would otherwise consider disclosure to be in the national interest. This result benefits no one.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

ROBERT E. KOPP
LEONARD SCHAITMAN
Attorneys

STANLEY SPORKIN
General Counsel

EDWARD PAGE MOFFETT
Assistant General Counsel
Central Intelligence Agency

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